

Time has already run out on electoral reform

The vow to ‘make every vote count’ in the next federal election may have sounded good on the campaign trail, but now that the Trudeau government is trying to implement voting changes it faces significant practical and constitutional constraints.

James Bowden

In last year’s federal general election, Justin Trudeau led the Liberal Party to a parliamentary majority after campaigning on a platform that included a promise that it would be the last time that Canadians would elect MPs under a single-member plurality electoral system, or “first past the post”; as Prime Minister, Trudeau has since reiterated this policy in the ministerial mandate letters and in the Speech from the Throne on December 4, 2015. The latter says, “To make sure that every vote counts, the Government will undertake consultations on electoral reform, and will take action to ensure that 2015 will be the last federal election conducted under the first-past-the-post voting system.”

While the Speech from the Throne adopted the language typically associated with proponents of a proportional system (“make every vote count”), it is extremely unlikely that the next scheduled federal general election in 2019 will be conducted under either mixed-member proportional representation (MMP) or the single transferable vote (STV) – irrespective of whatever the upcoming special parliamentary committee on electoral reform reports by December 1, 2016. For reasons set out below, Parliament *cannot* adopt MMP, with its dual ballot of electing members to geographic constituencies and electing members from the political parties’ lists for compensatory seats, nor STV, with its multi-member districts and preferential ballots, in time for 2019.

However, Parliament could feasibly adopt a majoritarian electoral system like the Australian-style instant run-off balloting, sometimes called a ranked ballot or alternative vote (AV), for 2019. This is because switching to AV would require only statutory amendments, such as to the *Canada Elections Act*, and would not require changing the boundaries of any electoral district.

In contrast, switching to either MMP or STV would certainly require both a constitutional amendment of some kind and changing the boundaries of all 338 electoral districts. The only question remains whether the constitutional amendment would



fall under the ambit of the amending formula under section 44 of the *Constitution Act, 1982*, which the Parliament of Canada alone can pass like a regular statute, or, more ominously, whether it would be subject to the dreaded General Amending Formula, requiring the consent of both houses of Parliament and two-thirds of the provinces with a majority of the national population.

The latter brings with it all of the implications that flow from “opening the Constitution,” as we tend to say in Canada, with the obvious, if unconscious, allusion to “opening Pandora’s Box”. It raises the spectre of the failed Meech Lake and Charlottetown Accords. Electoral reform most certainly is a constitutional matter, contrary to former chief electoral officer Jean-Pierre Kingsley’s recent bizarre assertion to the contrary.

Mixed-Member Proportional Representation and Single Transferable Vote

Let’s consider the most commonly proposed replacements for first past the post, MMP and STV.

Under mixed-member proportional representation (MMP), voters cast two ballots, one for their constituency member of

Parliament and another for the political party itself. Seats are then awarded to the political parties that won fewer constituency seats than their share of the popular vote would merit them. In this way, the overall percentage of seats that the political parties hold in the assembly comes much closer to the percentage of the party vote that they won in the election. Generally, this system benefits smaller parties, which would explain why the New Democratic Party and the Green Party have long advocated for it. Despite their claims to the contrary, they are motivated by self-interest just as much as the Liberals and Conservatives.

The single transferable vote (STV) relies on multi-member constituencies and allows voters to rank their preferred candidates in numerical order; a candidate must surpass a threshold number of votes in order to get elected. Unlike under MMP, STV ensures that all MPs represent geographic constituencies and not the political parties themselves. For candidates who surpass a given threshold, their surplus votes are redistributed according to the voters' ranked preferences. If some seats still remain to be filled after this first redistribution because none of the other candidates meets the quota, then the least successful candidate is eliminated from contention, and his or her votes are redistributed according to the voters' ranked preferences. This process continues until all the seats in the multi-member constituency have been filled.

In 2012, now Foreign Minister Stéphane Dion proposed that Canada adopt a system of STV with multi-member ridings represented by either three or five MPs. (Incidentally, Dion also argued that "precedent makes holding a referendum [on electoral reform] necessary.")


The Population Formula, the Decennial Census, and Electoral Boundary Commissions

Section 51(1) of the *Constitution Act, 1867* contains the formula by which seats in the House of Commons are allocated amongst the provinces after each decennial census. Parliament last amended this formula, and expanded the House of Commons from 308 to 338 seats, in 2011 by way of the constitutional amending procedure under section 44 of the *Constitution Act, 1982*. Section 51(1) also mandates that the seats in the House of Commons be redistributed after each decennial census; this process normally takes two years, and the next decennial census will not take place until 2021.

The current population formula is based on an "electoral quotient" that assigns approximately 111,000 people to each constituency. This electoral quotient forms the baseline number of seats that each province receives before the application of the other rules, which involve adding additional seats based on the Senate

Floor Rule, the Grandfather Clause, and the Representation Rule.

After this amendment to the formula in section 51(1) became law on December 11, 2011, the Harper government also had to issue an Order-in-Council pursuant to the *Electoral Boundaries Readjustment Act* in order to establish the boundary commissions in each of the 10 provinces, which in turn re-defined the borders of the country's electoral districts, since the House of Commons has also expanded from 308 to 338 seats. The general election of 2015 was the first conducted under this new formula; if proponents of proportional representation had their way, it would also be the last.



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This entire process of re-drawing the borders of Canada's electoral districts takes almost two years – and it could take even longer after adopting an entirely different electoral system. This practical constraint with the electoral boundary commissions shows why we could almost certainly not switch to MMP or STV in time for the next scheduled general election of 2019.

By definition, STV and MMP would require larger constituencies than the current electoral system. Under STV, each constituency would have multiple members representing it. Under MMP, Ontario could still return 121 MPs to Ottawa, but only, say, 80 MPs would represent geographic constituencies, while the other 41 would represent a party. More members per constituency or fewer members for the same number of constituencies would both mean larger constituencies. Larger constituencies contain a larger number of people.

Both MMP and STV would therefore run afoul of the current population formula contained in section 51(1) of the *Constitution Act, 1867*, and could therefore only be implemented by amending the rules under this section. This is because the formula under section 51(1) presumes that each electoral district contains a baseline of around 111,000 people, plus or minus the percentage variance allowed by the *Electoral Boundaries Readjustment Act* and taking

into account the current formula's exemptions and exceptions. While the current rules under section 51(1) are designed to accommodate increases in Canada's population determined after each decennial census, these existing rules simply could not accommodate the significantly larger population per electoral district that switching to MMP or STV would necessitate.

Since switching to STV or MMP would require adopting larger constituencies containing a larger number of people, the government would also therefore have to issue an Order-in-Council to call up the electoral boundary commissions in all 10 provinces so that they could then re-establish the borders of *all* 338 electoral districts. (The new MMP or STV system could still include a House of Commons consisting of 338 seats, but there would no longer be 338 geographic electoral districts.)

Then there is the Decennial Census Clause, which stipulates that the electoral boundary commissions must re-convene anyway after each decennial census; the next will occur in 2021. (The censuses held in 2006, 2016, etc., do not count as the constitutionally mandated decennial census). This means that even if the Trudeau government tried to strike up electoral boundary commissions in 2017 or 2018 after Parliament passed the constitutional amendment to alter the population formula in section 51(1), the government would have to strike up another round of electoral boundary commissions again anyway after the decennial census of 2021.

Establishing two sets of electoral boundary commissions within a period of four years would waste vast sums of money and amount to an unnecessary, impractical extravagance. Switching electoral systems on such short notice would also put an intolerable burden on Elections Canada, which has to train poll clerks and prepare the ballots months in advance of each general election.

The proportionate representation of the provinces: Do not disturb

If law-makers are not careful, a system of MMP or STV could contravene section 52 of the *Constitution Act, 1867*, which stipulates that the seats within the House of Commons must be distributed such that the "proportionate representation of the provinces" is "not thereby disturbed". Section 42(1)(a) of the *Constitution Act, 1982* subjects any change to this principle of "proportionate representation of the provinces" to the higher threshold of the General Amending Formula.

Based on the *Confederation Debates*, it is clear that in the 1860s, the phrase "proportionate representation" meant "representation by population," and that each province would enjoy representation in the House of Commons proportionate to its population.

The Fathers of Confederation thus replaced the illiberal distribution of seats in the United Province of Canada, where Canada West (Ontario) and Canada East (Quebec) each received 20 seats irrespective of their populations, with representation by population. The phrase used in the *Constitution Acts* most certainly does *not* correspond to the modern usage of "proportional representation" and proportional electoral systems.

As long as the compensatory seats under MMP or the multi-member constituencies of STV remained within only one province, these proportional systems would indeed not "disturb" that all-important "principle of the proportionate representation of the provinces". In other words, Parliament alone could therefore probably implement models of MMP or STV that did not in any way attempt to amalgamate seats between two or more provinces or otherwise render ambiguous which seats belonged to which province. This means that under MMP, the compensatory party list seats would have to remain within only one province and that each of the 10 provinces would remain the baseline for calculating the popular vote for the political parties.

If, however, we tried to create a system in which the compensatory seats are allocated based on the party vote between two or more provinces, or Canada-wide across all 10 provinces, we would then need to pass a constitutional amendment under the General Amending Formula. This is because taking away seats from the provinces for the sake of establishing a pool of seats that represent all Canadians, would "disturb" the "principle of the proportionate representation of the provinces."

This might frustrate some proponents of proportional representation who would prefer that the compensatory seats be allocated to the political parties based on their Canada-wide popular vote, but these reformers must respect the legal-constitutional authority of this country just as much as the retrogressive anti-democratic reactionaries like me who support single-member plurality.

In short, the only electoral reform that could be implemented in time for the next scheduled general federal election in October 2019 is AV; quite simply, time has run out on implementing MMP or STV. In a non-coincidental coincidence, the only system that Parliament could adopt in time for 2019 is the very same system that Prime Minister Trudeau himself has identified as his own personal preference. ✱

James Bowden has a B.A. in Political Science from Carleton University. He has authored numerous columns and articles on topics such as responsible government, executive authority over prorogation and dissolution, royal succession, and officialising constitutional conventions. He also blogs regularly at parliamentum.org.